

## **2005 DRAFTING REQUEST**

### **Bill**

Received: **03/03/2005**

Received By: **dkennedy**

Wanted: **As time permits**

Identical to LRB:

For: **Legislative Council - JLC 266-9791**

By/Representing: **Laura Rose**

This file may be shown to any legislator: **NO**

Drafter: **dkennedy**

May Contact:

Addl. Drafters:

Subject: **Health - medical assistance**

Extra Copies:

Submit via email: **YES**

Requester's email: **laura.rose@legis.state.wi.us**

Carbon copy (CC:) to: **robin.ryan@legis.state.wi.us**

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### **Pre Topic:**

No specific pre topic given

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### **Topic:**

Consent by a legal representative for participation in MA waiver

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### **Instructions:**

See Attached

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### **Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/P2	dkennedy 04/29/2005	kfollett 04/29/2005	rschluet 05/03/2005	_____	mbarman 05/03/2005		
/1	dkennedy 05/27/2005	kfollett 05/31/2005	rschluet 05/31/2005	_____	lemery 05/31/2005		S&L
/2	dkennedy 06/10/2005	kfollett 06/15/2005	jfrantze 06/15/2005	_____	sbasford 06/15/2005	mbarman 06/27/2005	S&L

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/1	dkennedy 05/27/2005	kfollett 05/31/2005	rschluet 05/31/2005		lemery 05/31/2005		S&L

FE Sent For:

NOTE:  
Please  
e-mail to  
mary.matthias@legis.state.wi.us12 kif  
6/15  
Self  
6/15  
<END>

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FE Sent For:

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P6  
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Drafter: dkennedy

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/?	dkennedy	1P2 kj 4/29	Ch 4-20 LC conversion				
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/?	dkennedy						
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FE Sent For:

**<END>**



1     **AN ACT** *to amend* 46.27 (11) (b), 46.277 (2) (intro.) and 46.278 (2) (a); and *to repeal*  
2     *and recreate* 46.275 (4) (b) 1. of the statutes; **relating to:** consent by a legal  
3     representative for participation in medical assistance waiver.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:**

**Legal Representative in Medical Assistance Waiver Programs**

Current law creates the following medical assistance (MA) waiver programs: s. 46.27 (11), the long-term support community options waiver program; s. 46.275, the community integration program for residents of state centers for the developmentally disabled, also known as the "CIP IA" program; s. 46.277, the community integration program for persons relocated or meeting reimbursable levels of care; and s. 46.278, the community integration program and brain injury waiver program for persons with developmental disabilities, also known as the "CIP IB" program. The department of health and family services (DHFS) is required, pursuant to 42 CFR 441.302 (d), in its waiver application to the federal department of health and human services, to provide assurances that persons served under these waiver programs are given the choice of either institutional or community-based services. If the individual cannot make that choice, it must be made by the person's legal representative. The legal representative is designated in accordance with the laws of the state that is granted the waiver.

Under current law, a guardian must be appointed for an individual who is protectively placed. Although the guardian has authority to make many legal decisions on behalf of the ward, under Wisconsin law the guardian may not make a decision to permanently place a ward in a state center for the developmentally disabled. Under s. 55.06 (9) (a), the circuit court that conducts the hearing on the protective placement decision must make the determination regarding where the ward is placed.

Currently, one of the waiver statutes, s. 46.275 (4) (b) 1., provides that consent for participation in the CIP IA program must be given by the person or the person's guardian, if the person is age 18 or over. That statute also provides, however, that this provision does not limit the authority of the circuit court to order a placement under s. 55.06.

This bill clarifies that, pursuant to 42 CFR 441.302 (d), the person or his or her legal representative must be informed of the alternatives available under the waiver and given a choice whether to participate in the waiver program. For persons over age 18, the legal representative may be the person, the person's guardian or activated power of attorney for health care, or a court. For persons under age 18, the legal representative may be the person's parent, guardian, legal custodian, or a court. If the person is under guardianship and protective placement but the guardian does not consent to participation, the determination to participate is made under ss. 55.07 to 55.12 by the court that ordered protective placement.

1       **SECTION 1.** 46.27 (11) (b) of the statutes is amended to read:

2       46.27 (11) (b) The department shall include all assurances required under 42 USC  
3       1396n (c) in the implementation of the waiver. The department shall ensure, pursuant to 42  
4       CFR 441.302(d), that the recipient or his or her legal representative is informed of the  
5       alternatives available under the waiver and is given a choice whether to participate in the  
6       wavier program. The legal representative may be the person's parent, guardian, legal  
7       custodian, or a court if the person is under age 18 or the person's guardian, activated power  
8       of attorney for health care, or the court if the person is age 18 or over. If the person is under  
9       guardianship and subject to protective placement under ss. 55.07 to 55.12 but the guardian  
10       does not consent to participation, the determination to participate in the program shall be made  
11       under ss. 55.07 to 55.12 by the court that ordered protective placement. If the person is under  
12       age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or guardian does not  
13       consent to participation, the determination to participate in the program shall be made under  
14       subch. VI of ch. 48 or subch. VI of ch. 938.

NOTE: Specifies, for the community options MA waiver program, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver are given the choice as to whether to participate. Also, describes who may act as a legal representative.

15       **SECTION 2.** 46.275 (4) (b) 1. of the statutes is repealed and recreated to read:

1           46.275 (4) (b) 1. Pursuant to 42 CFR 441.302 (d), that the recipient or his or her legal  
2 representative is informed of the alternatives available under the waiver, and is given a choice  
3 whether to participate in the waiver program. The legal representative may be the person's  
4 parent, guardian, legal custodian, or the court if the person is under age 18 or the person's  
5 guardian, activated power of attorney for health care, or a court if the person is age 18 or over.  
6 If the person is under guardianship and subject to protective placement under ss. 55.07 to 55.12  
7 but the guardian does not consent to participation, the determination to participate in the  
8 program shall be made under ss. 55.07 to 55.12 by the court that ordered protective placement.  
9 If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or  
10 guardian does not consent to participation, the determination to participate in the program  
11 shall be made under subch. VI of ch. 48 or subch. VI of ch. 938.

NOTE: Specifies, for the community integration program for residents of state centers, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver are given the choice as to whether to participate. Also, describes who may act as a legal representative.

12           **SECTION 3.** 46.277 (2) (intro.) of the statutes is amended to read:

13           46.277 (2) DEPARTMENTAL POWERS AND DUTIES. (intro.) The department may request  
14 a waiver from the secretary of the federal department of health and human services, under 42  
15 USC 1396n (c), authorizing the department to serve medical assistance recipients, who meet  
16 the level of care requirements for medical assistance reimbursement in a skilled nursing  
17 facility or an intermediate care facility, in their communities by providing home or  
18 community-based services as part of medical assistance. The number of persons for whom  
19 the waiver is requested may not exceed the number of nursing home beds that are delicensed  
20 as part of a plan submitted by the facility and approved by the department. If the department

1 requests a waiver, it shall include all assurances required under 42 USC 1396n (c) (2) in its  
2 request. The department shall ensure, pursuant to 42 CFR 441.302 (d), that the recipient or  
3 his or her legal representative is informed of the alternatives available under the waiver and  
4 is given a choice whether to participate in the waiver program. The legal representative may  
5 be the person's parent, guardian, legal custodian, or a court if the person is under age 18 or the  
6 person's guardian, activated power of attorney for health care, or a court if the person is age  
7 18 or over. If the person is under guardianship and subject to protective placement under ss.  
8 55.07 to 55.12 but the guardian does not consent to participation, the determination to  
9 participate in the program shall be made under ss. 55.07 to 55.12 by the court that ordered  
10 protective placement. If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but  
11 the person's parent or guardian does not consent to participation, the determination to  
12 participate in the program shall be made under subch. VI of ch. 48 or subch. VI of ch. 938.  
13 If the department receives this waiver, it may request one or more 3-year extensions of the  
14 waiver under 42 USC 1396n (c) and shall perform the following duties:

NOTE: Specifies, for the community integration program for persons meeting reimbursable levels of care, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver are given the choice as to whether to participate. Also, describes who may act as a legal representative.

15 **SECTION 4.** 46.278 (2) (a) of the statutes is amended to read:

16 46.278 (2) (a) The department may request one or more waivers from the secretary of  
17 the federal department of health and human services, under 42 USC 1396n (c), authorizing  
18 the department to serve medical assistance recipients, who meet the level of care requirements  
19 for medical assistance reimbursement in an intermediate care facility for the mentally retarded  
20 or in a brain injury rehabilitation facility, in their communities by providing home or

1 community-based services as part of medical assistance. If the department requests a waiver,  
2 it shall include all assurances required under 42 USC 1396n (c) (2) in its request. The  
3 department shall ensure, pursuant to 42 CFR 441.302 (d), that the recipient or his or her legal  
4 representative is informed of the alternatives available under the wavier and is given a choice  
5 whether to participate in the waiver program. The legal representative may be the person's  
6 parent, guardian, legal custodian, or a court if the person is under age 18 or the person's  
7 guardian, activated power of attorney for health care, or a court if the person is age 18 or over.  
8 If the person is under guardianship and subject to protective placement under ss. 55.07 to 55.12  
9 but the guardian does not consent to participation, the determination to participate in the  
10 program shall be made under ss. 55.07 to 55.12 by the court that ordered protective placement.  
11 If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or  
12 guardian does not consent to participation, the determination to participate in the program  
13 shall be made under subch. VI of ch. 48 or subch. VI of ch. 938.

**NOTE:** Specifies, for the community integration program and brain injury waiver program for persons with developmental disabilities, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver are given the choice as to whether to participate. Also, describes who may act as a legal representative.



TUESDAY, if possible  
State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-2340/P1 P2

DAK:ch

lgf

D-NOTE

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to amend* 46.27 (11) (b), 46.277 (2) (intro.) and 46.278 (2) (a); and *to*  
2 *repeal and recreate* 46.275 (4) (b) 1. of the statutes; **relating to:** consent by  
3 a legal representative for participation in medical assistance waiver. *program*

***Analysis by the Legislative Reference Bureau***

This is a preliminary draft. An analysis will be provided in a later version.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:

Legal Representative in Medical Assistance Waiver Programs

Current law creates the following medical assistance (MA) waiver programs: s. 46.27 (11), the long-term support community options waiver program; s. 46.275, the community integration program for residents of state centers for the developmentally disabled, also known as the "CIP IA" program; s. 46.277, the community integration program for persons relocated or meeting reimbursable levels of care; and s. 46.278, the community integration program and brain injury waiver program for persons with developmental disabilities, also known as the "CIP IB" program. The department of health and family services (DHFS) is required, pursuant to 42 CFR 441.302 (d), in its waiver application to the federal department of health and human services, to provide assurances that persons served under these waiver programs are given the choice of either institutional or community-based services. If the individual cannot make that choice, it must be made by the person's legal representative. The legal representative is designated in accordance with the laws of the state that is granted the waiver.

Under current law, a guardian must be appointed for an individual who is protectively placed. Although the guardian has authority to make many legal decisions on behalf of the ward, under Wisconsin law the guardian may not make a decision to permanently place a ward in a state center for the developmentally disabled. Under s. 55.06 (9) (a), the circuit court that conducts the hearing on the protective placement decision must make the determination regarding where the ward is placed.

Currently, one of the waiver statutes, s. 46.275 (4) (b) 1., provides that consent for participation in the CIP IA program must be given by the person or the person's guardian, if the person is age 18 or over. That statute also provides, however, that this provision does not limit the authority of the circuit court to order a placement under s. 55.06.

This bill clarifies that, pursuant to 42 CFR 441.302 (d), the person or his or her legal representative must be informed of the alternatives available under the waiver and given a choice whether to participate in the waiver program. For persons over age 18, the legal representative may be the person, the person's guardian or activated power of attorney for health care, or a court. For persons under age 18, the legal representative may be the person's parent, guardian, legal custodian, or a court. If the person is under guardianship and protective placement but the guardian does not consent to participation, the determination to participate is made under ss. 55.07 to 55.12 by the court that ordered protective placement.

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46.27 (11) (b) The department shall include all assurances required under 42 USC 1396n (c) in the implementation of the waiver. ~~The department shall ensure,~~ pursuant to 42 CFR 441.302(d), that the ~~recipient~~ <sup>person</sup> or his or her legal representative is informed of the alternatives available under the waiver <sup>program</sup> and is given a choice <sup>or not</sup> whether to participate in the wavier program. <sup>If the person is a minor,</sup> The legal representative may be the <sup>minor's</sup> person's parent, guardian, legal custodian <sup>or</sup> or a court if the person is under age 18 <sup>INSERT 2-8</sup> or the person's guardian, activated power of attorney for health care, <sup>regardless of age,</sup> or the court if the person is age 18 or over. <sup>ch. 55</sup> If the person is under guardianship and subject to protective placement under ~~ss. 55.07 to 55.12~~ <sup>ch. 55</sup> but the guardian does not consent to participation, the determination to participate in the program shall be made under ~~ss. 55.07 to 55.12~~ <sup>ch. 55</sup> by the court that ordered protective placement. If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or guardian does not consent to participation, the determination to participate in the program shall be made under subch. VI of ch. 48 or subch. VI of ch. 938.

if any or a  
court-appointed  
representative

NOTE: Specifies, for the community options MA waiver program, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver ~~are~~ given the choice as to whether to participate. Also, describes who may act as a legal representative.

SECTION 2. 46.275 (4) (b) 1. of the statutes is repealed and recreated to read:

46.275 (4) (b) 1. Pursuant to 42 CFR 441.302 (d), that the ~~recipient~~ <sup>person</sup> or his or her legal ~~representative~~ <sup>guardian</sup> is informed of the alternatives available under the waiver <sup>program</sup> and is given a choice whether <sup>or not</sup> to participate in the waiver program. ~~The legal representative may be the person's parent, guardian, legal custodian, or the court if the person is under age 18 or the person's guardian, activated power of attorney for health care, or a court if the person is age 18 or over. If the person is under guardianship and subject to protective placement under ss. 55.07 to 55.12 but the guardian does not consent to participation, the determination to participate in the program shall be made under ss. 55.07 to 55.12 by the court that ordered protective placement. If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or guardian does not consent to participation, the determination to participate in the program shall be made under subch. VI of ch. 48 or subch. VI of ch. 938.~~

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SECTION 3. 46.277 (2) (intro.) of the statutes is amended to read:

46.277 (2) DEPARTMENTAL POWERS AND DUTIES. (intro.) The department may request a waiver from the secretary of the federal department of health and human services, under 42 USC 1396n (c), authorizing the department to serve medical assistance recipients, who meet the level of care requirements for medical assistance reimbursement in a skilled nursing facility or an intermediate care facility, in their



## SECTION 3

INSERT 4-10

communities by providing home or community-based services as part of medical assistance. The number of persons for whom the waiver is requested may not exceed the number of nursing home beds that are delicensed as part of a plan submitted by the facility and approved by the department. If the department requests a waiver, it shall include all assurances required under 42 USC 1396n (c) (2) in its request.

<sup>ensuring</sup>  
<sup>, including ensuring</sup>  
The department shall ensure, pursuant to 42 CFR 441.302 (d), that the recipient or his or her legal representative is informed of the alternatives available under the waiver and is given a choice whether to participate in the waiver program. The legal representative may be the person's parent, guardian, legal custodian, <sup>or not</sup> <sup>minor's</sup> <sup>or</sup> a court if the person is under age 18 or the person's guardian, activated power of attorney for health care, <sup>or a court if the person is age 18 or over.</sup> If the person is under guardianship and subject to protective placement under ss. 55.07 to 55.12 but the guardian <sup>use law ch. 55</sup> does not consent to participation, the determination to participate in the program shall be made under ss. 55.07 to 55.12 by the court that ordered protective placement. If the person is under age 18 and is not subject to ss. 55.07 to 55.12 but the person's parent or guardian does not consent to participation, the determination to participate in the program shall be made under subch. VI of ch. 48 or subch. VI of ch. 938. If the department receives this waiver, it may request one or more 3-year

extensions of the waiver under 42 USC 1396n (c) and shall perform the following duties:

NOTE: Specifies, for the community integration program for persons meeting reimbursable levels of care, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver <sup>and</sup> are given the choice as to whether to participate. Also, describes who may act as a legal representative.

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court-appointed  
representative

*including  
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6 facility, in their communities by providing home or community-based services as  
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8 assurances required under 42 USC 1396n (c) (2) in its request. ~~The department shall~~  
9 ~~ensure~~, pursuant to 42 CFR 441.302 (d), that the ~~recipient~~ <sup>person</sup> or his or her legal  
10 representative is informed of the alternatives available under the wavier and is  
11 given a choice whether <sup>or not</sup> to participate in the waiver program. <sup>minor's</sup> The legal  
12 representative may be the <sup>or</sup> person's parent, guardian, legal custodian, <sup>or</sup> a court if the  
13 <sup>INSERT 5-13</sup> person is under age 18 <sup>or</sup> the person's guardian, activated power of attorney for  
14 health care, <sup>or</sup> a court if the person is age 18 or over. If the person is under  
15 guardianship and subject to protective placement under <sup>ch. 55</sup> ss. 55.07 to 55.12 but the  
16 guardian does not consent to participation, the determination to participate in the  
17 program shall be made under ss. 55.07 to 55.12 by the court that ordered protective  
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20 to participate in the program shall be made under subch. VI of ch. 48 or subch. VI  
21 of ch. 938.

NOTE: Specifies, for the community integration program and brain injury waiver program for persons with developmental disabilities, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver ~~are~~ given the choice as to whether to participate. Also, describes who may act as a legal representative.

INSERT 5-22

*if any, or a  
court-appointed  
representative*

*and  
regardless  
of  
age*

*Is  
the  
person  
is a  
minor?*

*the  
agent  
under  
the  
person's*

**2005-2006 DRAFTING INSERT**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2340/P2ins  
DAK:....ch

**INSERT 2-8**

1       , except that, if the minor's parent, guardian, or legal custodian does not consent  
2       to participation, the department shall file a petition with the court assigned to  
3       exercise jurisdiction under ch. 48 for a hearing on the best interests of the minor and  
4       an order requiring participation. If the person is aged 18 or older, the legal  
5       representative may be

**INSERT 4-10**

6       , except that, if the minor's parent, guardian, or legal custodian does not consent  
7       to participation, the department shall file a petition with the court assigned to  
8       exercise jurisdiction under ch. 48 for a hearing on the best interests of the minor and  
9       an order requiring participation. If the person is aged 18 or older, the legal  
10       representative may be

**INSERT 5-13**

11       , except that, if the minor's parent, guardian, or legal custodian does not consent  
12       to participation, the department shall file a petition with the court assigned to  
13       exercise jurisdiction under ch. 48 for a hearing on the best interests of the minor and  
14       an order requiring participation. If the person is aged 18 or older, the legal  
15       representative may be

**INSERT 5-22**

16       **SECTION 1.** 48.14 (12) of the statutes is created to read:

17       48.14 (12) Proceedings under ss. 46.27 (11) (b), 46.277 (2) (intro.), and 46.278  
18       (2) (a).

19       **SECTION 2.** 48.185 (1) of the statutes is amended to read:

1           48.185 (1) Subject to sub. (2), venue for any proceeding under ss. 48.13, 48.133,  
2           48.135 and 48.14 (1) to (9) and (12) may be in any of the following: the county where  
3           the child or the expectant mother of the unborn child resides or the county where the  
4           child or expectant mother is present. Venue for proceedings brought under subch.  
5           VIII is as provided in this subsection except where the child has been placed and is  
6           living outside the home of the child's parent pursuant to a dispositional order, in  
7           which case venue is as provided in sub. (2). Venue for a proceeding under s. 48.14  
8           (10) is as provided in s. 801.50 (5s).

9           **History:** 1977 c. 354; Stats. 1977 s. 48.185; 1979 c. 330; 1989 a. 161; 1993 a. 98, 318, 491; 1995 a. 77, 275; 1997 a. 80, 292.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2340/P2dn

DAK: *lch*

*Kf*

*Date*

To Laura Rose:

*X*  
*02*  
After talking with Gordon Malaise, the drafter for the Children's Code, I have changed the references to subch. VI of ch. 48, stats., and subch. VI of ch. 938, stats., in the draft. The procedures in those statutes seem inappropriate, since the minor in question has not been adjudged to be in need of protection ~~and~~ services and would not seem to be in a situation of juvenile delinquency. Instead, I have required that, in an instance in which a minor's parent, guardian, or legal custodian refuses to consent to participation in a waiver program (except s. 46.275, stats.), DHFS must file a petition with juvenile court for a hearing and order requiring participation. I have created s. 48.14 (12) and amended s. 48.285 (1) to provide for jurisdiction and venue. Lastly, I have created a best interests standard for the court to use. Currently, detailed procedures and standards for a court exist in a somewhat analogous situation, under s. 146.34 (5), stats. Would you want the more detailed procedures for the hearing that are set forth in that subsection?

*X*  
*1*  
Because s. 46.275, stats., is involved exclusively with relocating persons who are already in state centers for the developmentally disabled into the community, and because admittance to such a state center can only be made under a protective placement, regardless of age, I have removed from the amendments to s. 46.275 (4) (b) 1., stats., the provision that deals with the situation of a minor who is not under guardianship and not subject to protective placement, because it seems to be inapt.

I also have changed the reference to "ss. 55.07 to 55.12" to "ch. 55" throughout the draft because, for a stand-alone bill (i.e., one that does not contain the changes to ch. 55, stats., that are in the main draft for the Committee), we must draft to current law.

*X*  
I have changed the provisions that authorize the court to be a person's legal representative; I don't believe that works, because, in any proceeding before a court, the court would be required to be the person's advocate, rather than the decision maker. I have, instead, used the term "court-appointed legal representative." Please review.

Please let me know if I may give you any other assistance with this bill draft.

Debora A. Kennedy  
Managing Attorney  
Phone: (608) 266-0137  
E-mail: debora.kennedy@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2340/P2dn

DAK:kjf:rs

May 3, 2005

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5/27/05 Mtg. w/ Laura Rose:

- 2340/P1

1. D-NOTE # 1: ok; no more detailed procedures
2. D-NOTE - Fourth # : keep as in draft
3. Change draft to conform 

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-2340/P2dn  
DAK:kjf:rs

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E-mail: debora.kennedy@legis.state.wi.us *See changes*